



SUPREME COURT OF THE UNITED STATES

July Term, 1978

No.

78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID M. JONES
1600 PNB Building
Philadelphia, Penna.
19107

OLAN B. LOWREY
1719 North Broad Street
Philadelphia, Penna.
19122

Attorney for Petitioners

Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
Opinions below.....	2
Jurisdiction.....	2
Questions presented.....	3
Statutes, Federal rules and regulations involved.....	8
Statement.....	9
Reasons for granting the Writ.....	15
Conclusion.....	39
Appendix.....Under Separate Cover	

TABLE OF CITATIONS

Cases:

<u>Armstrong v. Manzo</u> , 380 U.S. 545 (1965).....	24
<u>Blasiis v. Bartell</u> , 143 Pa. Super. 485, 18 A.2d 478 (1941).....	23
<u>Clark v. Sandusky</u> , 205 F.2d 915 (7th Cir. 1953).....	31

Cases:

Page

<u>Diaz v. Southern Drilling Corp.</u> , 427 F.2d 118 (5th Cir. 1970), cert.denied sub nom. Trefina, <u>A.G. v. U.S.</u> , 400 U.S. 878 (1970)...	20,23
<u>Grannis v. Ordean</u> , 234 U.S. 385 (1914).....	24
<u>Joseph Skilken & Co. v. City of Toledo</u> , 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (mem.) prior decision adhered to, 558 F.2d 1283 (6th Cir.), cert. denied, ____ U.S. ____, 98 S.Ct. 611 (1977).....	20, 21, 22, 23,24
<u>Kaufman v. Wolfson</u> , 137 F.Supp. 479 (S.D.N.Y. 1956).....	30
<u>Kozak v. Wells</u> , 278 F.2d 104 (8th Cir. 1960).....	29,30
<u>Metropolitan Housing Development Corp.</u> <u>v. Village of Arlington Heights</u> , 558 F.2d 1283 (7th Cir. 1977), cert. denied, ____ U.S. ____, 98 S.Ct. 752 (1978).....	34,35
<u>Pritz v. Messer</u> , 112 Ohio St.628, 149 N.E. 30 (1925).....	22
<u>Rosenberg v. Mehl</u> , 37 Ohio App. 95, 174 N.E. 152 (1930).....	22

Cases:	<u>Page</u>
<u>Village of Arlington Heights v. Metropolitan Housing Development Corp.</u> , 429 U.S. 252 (1977).....	33, 34,35
<u>United States Constitution:</u>	
5th Amendment.....	3,10,23
14th Amendment.....	3,10
<u>Statutes:</u>	
28 U.S.C. § 1254(1) (1970).....	2
42 U.S.C. §§ 1401-1436 (1970).....	37
<u>Rules:</u>	
Federal Rules of Civil Procedure	
19.....	7,8,9,31,32
24(a)(2).....	4,5,6,8,13,15,19,20,26,32
Local Rules of Civil Procedure	
Eastern District of Penna., Rule 3(d)..<	7
<u>Regulations:</u>	
24 C.F.R. § 880.102	37-38

SUPREME COURT OF THE UNITED STATES

July Term, 1978

No.

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES

DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

David M. Jones, on behalf of Rose Angelino,
Rebecca Berkowitz, Esther Black, Irving Black,
Robert and Joyce Breeding, Linda Condon, Eugene
DiRe, James Hughes, Max Levit, Sarah Meltz,

1.

Libby Mitchell, David Oser, Esther Oser, Louis Oser, David Perez, Sue Winant, Enith Zaid and Albert Zaid prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on February 23, 1978.

Opinions Below

The opinion of the District Court for the Eastern District of Pennsylvania is not reported. It is cited as Dodson v. Salvitti, No. 74-1854 (E.D.Pa. Aug. 8, 1977). It was adopted by the Third Circuit and the slip opinion is appended hereto as Appendix 3.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on February 23, 1978, and a copy is cited at 571 F.2d 571 (3rd Cir. 1978) as a memorandum opinion. The slip opinion is appended to this petition as Appendix 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

This litigation was initiated as an eviction action in an urban renewal area against respondents by a private landlord in State Court in the city of Philadelphia. The respondents, tenants, argued that their relocation and 5th and 14th Amendment rights had been violated and joined the Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA). HUD removed the case to Federal Court where the action was ultimately settled pursuant to a Stipulation approved by the Federal Court. The tenants were to move and RDA was to try and relocate the tenants in the urban renewal area. The case was then "dismissed". Petitioners then sought to intervene. The trial judge said a hearing would be held if he ever determined to enforce the Stipulation.

The tenants violated the Stipulation by refusing to move and were evicted by Federal Court

Order.

Respondents, both black and white, then filed a new action which, in violation of the companion case rule in the Eastern District of Pennsylvania, was assigned to a new judge. Upon finding out about the new action petitioners, with some additional individuals, once again sought to intervene.

Without taking testimony or holding a hearing the Trial Court dismissed on the primary ground that petitioners had under Rule 24(a)(2) no interest in protecting their homes against diminution in value as a result of government subsidized low-income housing proposed in the settlement agreement and on the secondary ground that their action was not timely. The Trial Court acknowledged there was no adequate representation of petitioners interests. The Third Circuit affirmed.

4.

The questions presented are:

1. Do homeowners and residents in an urban renewal area have under Rule 24(a)(2) F.R.C.P. an interest that relates "to the property or transaction which is the subject of the action" where the complaint alleges a failure of the Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA) to provide permanent replacement housing, and:

- (a) The complaint seeks to enjoin RDA and HUD from disposing of any land or buildings in the urban renewal area;
- (b) RDA has entered into a prior stipulation (abrogated by respondents) to furnish government sponsored low-income housing in the urban renewal area;
- (c) An Order of Lis Pendens has been filed against three specific lots within the urban renewal area;

5.

- (d) A consent decree has been prepared to place government sponsored low-income housing in the urban renewal area at the three locations cited in the Lis Pendens order;
- (e) The respondent tenants have refused permanent relocation anywhere outside the urban renewal area; and
- (f) Government sponsored low-income housing will seriously injure the value of petitioners homes in the most expensive residential sector of center city Philadelphia?

2. Have homeowners made timely intervention under Rule 24 F.R.C.P. where

- (a) In 1974 they sought to intervene in an identical cause of action between the same parties and the Trial Judge in chambers advised petitioners that a Stipulation signed by him had been ar-

rived at between the parties and the case dismissed, that he did not at that time intend to take any action to enforce the Stipulation, that if he changed his mind he would notify petitioners and hear their motion to intervene;

- (b) The trial court never notified petitioners, but did evict Respondents because of their refusal for some 233 days to abide by the court approved Stipulation;
- (c) Another lawsuit was filed by respondents some three weeks after their eviction against the same parties involving the same issues;
- (d) The action was in violation of local Rule 3 E.D.P. assigned to another trial judge;
- (e) Respondents violated Rule 19 F.R.C.P. by failing to notify the Court of peti-

tioners interest; and

- (f) Petitioners had no knowledge of the new lawsuit until some two and one-half years later at which time they promptly sought to intervene?

Statutes, Federal Rules and
Regulations Involved

Rule 24(a)(2) of the Federal Rules of Civil Procedure reads in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (emphasis added)

Rule 19 states in relevant part:

JOINDER OF PERSONS NEEDED FOR JUST

ADJUDICATION

- (a) Persons to be joined if feasible.

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if *** (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest... (emphasis added)

...

- (c) Pleading Reasons for Non-Joinder

"A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

Statement

This litigation was initiated as an eviction action against the petitioners by their private landlord, a non-profit housing corporation entitled Octavia Hill Association. The relevant housing was in an early urban renewal area known

as Society Hill, the most expensive center city residential area in the city of Philadelphia. Respondents included by way of third party action the City of Philadelphia, The Department of Housing and Urban Development (HUD), the Philadelphia Redevelopment Authority (RDA) and certain named individuals as officials in one of those governmental entities. The respondents argued that their relocation and constitutional rights under the 5th and 14th Amendments were being disregarded.

The case was removed to the Federal District Court for the Eastern District of Pennsylvania by HUD. The case was settled on trial date October 11, 1973 pursuant to a Court endorsed Stipulation. The Stipulation mandated that the respondent tenants vacate the private housing occupied by them within thirty days for temporary accommodations to be furnished by the Philadelphia Redevelopment Authority. The Authority was then to exercise its best efforts to provide relocation housing at

707 Pine Street within the urban renewal area in question. The action against the governmental entities and their respective officers was expressly "dismissed".

The tenants had been shown numerous properties available for relocation outside of expensive Society Hill. They had refused all housing outside Society Hill.

In violation of the Court endorsed Stipulation the respondents refused for some two hundred and thirty-three days to vacate the premises pursuant to the stipulation and were ultimately evicted by Federal Court Order.

After the Stipulation had been entered into and before respondents had refused to comply with it several of the present petitioners sought to intervene to protect their economic interests against government sponsorship of low-income housing among their homes. The trial judge held a conference and advised the petitioners that he did

not at that time plan to take any action to implement the Stipulation. He stated that if he ever decided to do so, he would first hear the motion to intervene. Inasmuch as the respondents violated the Stipulation and were evicted from the premises by Order dated June 28, 1974 some 233 days later Judge Weiner took no action to enforce the contingent responsibility of the Philadelphia Redevelopment Authority to provide housing at 707 Pine Street in Society Hill.

It is uncontested in the pleadings that on July 26, 1974, three weeks after being evicted, the tenants, unknown to petitioners, filed this lawsuit on the same basic issue of relocation, again suing RDA and HUD.

In violation of the companion case rule (#3) of the Eastern District of Pennsylvania the case was assigned to a new trial judge who had not been involved in the prior dismissal or eviction because of violation of the Stipulation. Respon-

dent tenants did not notify the new trial judge of the names of the intervenors claiming an interest in the proceeding as required by Rule 19 F.R.C.P.

Respondents, both black and white, demanded permanent replacement housing and asked that HUD and RDA be enjoined from disposing of any property in Society Hill. A Lis Pendens Order was filed as to three specific sites in Society Hill and a consent decree was drafted to place housing on those three sites in Society Hill.

In November of 1976, counsel for petitioners was by happenstance advised by counsel for the Philadelphia Redevelopment Authority that some type of lawsuit was pending in Society Hill that sounded somewhat similar to that previously dismissed by Judge Weiner. Counsel for petitioners requested a copy of the pleadings and upon examination of such pleadings made known to his clients for the first time the fact of the new law-

suit. Motion to intervene was then filed on January 13, 1977 and immediately denied. A second petition to intervene was filed and again denied. On the second denial of the right to intervene the trial judge denied to those opposing low-income housing the right to intervene as defendants but specifically reserved the right of intervention to any persons as plaintiffs who belonged to the proposed class.

Appeal from the denial of the right to intervene was filed on May 19, 1977.

After hearing the Third Circuit Court of Appeals affirmed the trial court by its decision of February 23, 1978, stating that it did so "for the reasons set forth in the District Court opinion by the Honorable Donald W. VanArtsdalen, /F.Supp./ (ed. Pa. 1977)". Petition for rehearing in banc was then filed. Such petition was denied on April 10, 1978. (A-5)

The opinion (A-3) held that the petitioners had no interest in the subject matter of the litigation because the complaint allegedly did not ask that low-income housing be placed in Society Hill. A second reason given was that petitioners had not filed a timely application. The Court disregarded the pleadings as to lack of knowledge.

Reasons for Granting the Writ

The decision below should be reversed for the following reasons:

1. In a serious departure from judicial standards the lower courts erroneously held that homeowners and residents had under Rule 24(a)(2) no interest in the property or transaction which was the subject of an action to place low-income housing among their homes.

The district Court below denied the right to intervene on the grounds that the "proposed intervenors' interest does not relate 'to the property or transaction which is the subject of the action.'"

The Court's reasoning was that the homeowners and residents who sought to protect the value of their homes did not have an interest in the subject matter of the litigation because the complaint did not specifically demand relocation within the immediate confines of Society Hill where they lived.

The Court stated:

"The motion to intervene proceeds upon the assumption that the purpose of plaintiffs' lawsuit is to introduce low-income housing specifically into the Society Hill area. If this assumption was in fact true, then the proposed intervenors' interest might relate to the property which is the subject of the action and the disposition of the lawsuit might in some way affect that interest. However, upon careful review of the complaint and other relevant documents, it is apparent that such is not the purpose. As previously noted, the thrust of the complaint is that HUD and RDA violated various Federal statutes dealing with the relocation of displaced residents of the URA and plaintiffs merely seek compliance with such statutes. Therefore, while the ultimate effect of a settlement between the parties may be to locate or construct low-income housing in the western sector of Society Hill, the purpose of plaintiffs' lawsuit is not to compel HUD and RDA to construct permanent replacement housing within that specific area.

Since this action was instituted in order to force HUD and RDA to comply with various Federal statutes, and not to compel them to construct the replacement housing in the URA, the proposed intervenors have failed to assert an interest which relates 'to the property or transaction which is the subject of the action' and have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as a right."(A-3,pp.9-10)

The lower Courts are clearly in error as to intent. First, respondents in the complaint sought to enjoin both HUD and RDA from either demolishing, conveying or otherwise disposing of any dwelling or parcels of land within Society Hill that were owned or controlled by RDA and which were potentially available for use as permanent replacement housing until such time as defendants had provided permanent replacement housing for the plaintiffs. They had also filed a Lis Pendens Order in the same litigation bearing the same case number that called for low-income housing at three specific sites in Society Hill. They had refused relocation housing outside Society Hill and had to the Court's certain knowledge drafted a consent decree to be signed by

the Court in this proceeding calling for low-income housing at the same three sites in Society Hill. That consent decree has now been signed. In addition, in the proceeding that had been dismissed by the first trial judge they had signed a Stipulation, violated by them, calling for relocation at 707 Pine Street in Society Hill.

The intent to place low-income housing in Society Hill is explicit in both Complaint, Lis Pendens Order, Consent Decree, Court endorsed Stipulation and the respondents conduct in refusing to accept relocation housing outside of Society Hill. It is respectfully submitted that in order to conclude that plaintiffs lack an interest in the subject matter of protecting their rather expensive homes from the economic impact of low-income housing because the Complaint itself did not give addresses into which relocation must take place would appear to totally ignore reality as well as those Court documents giving addresses.

Not only is it well established that a liberal standard has to be applied in favor of intervention as of right under Rule 24 F.R.C.P., Diaz v. Southern Drilling Corp., 427 F.2d 118, 126 (C.A. 5th 1970) cert. denied Trefina, A.G. v. U.S., 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed. 2d 115 (1970), but the very wording of Rule 24(a)(2) was clearly designed to look to the practical effect of litigation. In relevant part it states that there shall be intervention as of right

"... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest..." (emphasis added)

It is clear that under the clear wording and intent of the Rule it is not controlling whether the injury was specifically pleaded for so long as the disposition might as a practical matter cause injury. Even had no intent as to location been evidenced until a consent decree was prepared, surely respondents would have had an interest in the sub-

ject matter of the litigation.

2. Not only did the Third Circuit disregard the clear purpose and intent of Rule 24(a)(2) but their decision is in irreconcilable conflict with that of the Sixth Circuit in Joseph Skilken & Co., 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (mem.), prior decision adhered to, 558 F.2d 1283 (6th Cir.)(per curiam), cert. denied, ___ U.S. ___, 98 S.Ct. 611 (1977). This is the only other decision found specifically addressing the right to intervene to halt the construction of low-income housing. The facts are almost startlingly identical to those in the instant litigation. Three separate sites, as here, were proposed for low-income housing in an expensive neighborhood, as here, in the City of Toledo. The zoning would have to be changed at one of the three sites in order to erect the proposed housing as opposed to a necessary change at two sites in the instant

litigation.¹ The housing proposed in the Consent Decree is multi-family. Two of the three lots proposed for such housing, Parcels 161 and 126 are zoned R 10A which precludes the construction of multi-unit housing. The other Parcel, No. 140, is zoned R 10, which permits multi-unit housing but in order to install the proposed number of units a zoning variance for parking would probably be required. The court in Skilken observed (p. 880) that, as here, there had been no attack on the comprehensive zoning ordinance, that at p. 881:

"(15) We live in a free society. The time is not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a

¹ The lower Courts are in error in stating that the litigation involved an attempt to install housing that complied "fully with all valid zoning, building, fire and safety codes..." (A-3, p. 14)

neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families."

The Court then concluded that under the law of Ohio from which the action arose a citizen had a right to enjoin a zoning violation in order to avoid prejudice, stating at p. 875:

"If the Court of Common Pleas should grant the relief asked for, it would certainly deprive the plaintiff in error Rosenberg, of his rights declared under the decision in the case of Pritz v. Messer. He would be barred from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city, as this would mean an injunction against the carrying out of the judgment of a court of record, which judgment would be determinative of facts giving rise to plaintiff in errors cause of action."

The Sixth Circuit then observed, at p. 875:

"So, in the present case, like Rosenberg, the denial of the motion to intervene has barred the property owners 'from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city....'"

It is also the law in the State of Pennsylvania that a property owner has a cause of action to enjoin a zoning violation. Blasiis v. Bartell, 18 A.2d 478 (Sup. Ct. Pa. 1941).

The Sixth Circuit then held that the right to intervene to protect against a zoning change could "...further be justified on the ground that intervention was necessary to accord the property owners due process of law guaranteed by the Fifth Amendment." Intervenor has pleaded that placing low-income housing in Society Hill as urged by plaintiffs would constitute "taking a property without just compensation as mandated by the Fifth Amendment of the Federal Constitution." (A-28). In Diaz v. Southern Drilling Corp. 427 F.2d 1118 (C.A. 5th 1970) cert. denied Trefina, A.G. v. U.S., 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed. 2d 115 (1970), this Court stated at p. 1124 that "interests in property are the most elementary type of right that Rule 24(a) is designed to protect." This

Court in Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965) stated:

"A fundamental requirement of due process is 'the opportunity to be heard.'" Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. It is an opportunity which must (p. 876) be granted at a meaningful time and in a meaningful manner."

If intervenors are denied the right to intervene then they will have recourse, if at all, only to a collateral attack on a judgment. In the language of this Court that would not constitute a hearing at "a meaningful time and in a meaningful manner."

The Sixth Circuit decision is in total contrast to that of the Third Circuit where the lower Court stated "the argument that low-cost housing, in and of itself, would cause any legal harm or damage to petitioners is totally rejected." (A-3, p.14) In contrast, the Sixth Circuit stated, at p. 880:

"Under this broad order all zoning laws in conflict therewith would be invalidated. Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed. All this would be accomplished simply by an order of a federal judge, and at the expense of the taxpayers.

It is submitted that Congress never vested any such power in Federal Judges." (emphasis added)

3. Disregarding the fact that petitioners had pleaded that they had no knowledge of the pending litigation and though no evidence had been taken the Courts below in a statement of startling contradiction held "arguendo" that petitioners had not timely intervened because "...the proposed intervenors in this case knew or should have known from the time this litigation was commenced that the ultimate disposition of

these proceedings might well affect the interest which they now seek to protect." (A-3, p.12) On the one hand the Court states there is no interest threatened in the complaint. In the same opinion the Court recognizes that the ultimate disposition of these proceedings might well affect the interest which the petitioners seek to protect. How inconsistent! Judicial admission? Abuse of judicial power? The language of the Court is almost identical to that contained in Rule 24(a)(2) which determines when a party has a right to intervene based on an interest in the subject matter.

4. By concluding that petitioners had or should have had knowledge of the second action from its inception the Courts below have violated the accepted standard of law in other circuits that where evidence is not taken the factual averments in a pleading must be accepted as true. This is especially compelling law where, as here, no allegation of knowledge was made by any respondent.

Though petitioners pleaded that they had no knowledge of the second lawsuit before a different judge until shortly before they filed suit on January 13, 1977, the Trial Court in effect made an erroneous finding of fact that they had knowledge for two and one-half years:

"... the proposed intervenors in this case knew or should have known from the time that this litigation was commenced that the ultimate disposition of these proceedings might well affect the interests which they now seek to protect. Nonetheless, they chose to remain inactive and ignored this litigation until approximately two and one-half years after its commencement, long after various alternative settlement possibilities had been fully explored."

It was stated in Intervenors Answer to Memorandum of Federal Defendants in Opposition to (Renewed) Motion to Intervene as Defendants:

"Counsel for intervenors found out about the instant litigation through a casual conversation with counsel for the Philadelphia Redevelopment Authority and immediately asked for a copy of the pleadings in order to ascertain if the matter were of importance to his clients. It was assumed that the litigation was of a sub-

stantially different nature because otherwise it would already have been pending before the Honorable Charles Weiner. Upon receipt of a copy of the pleadings the information was immediately transferred by counsel to his client and a petition for intervention was filed within a few weeks after that time. Up until counsel's conversation with Buford Tatum, Esq., counsel assumed that if any proceedings were to be taken in the matter that counsel would be notified. It is still perplexing as to why the proceeding is not before Judge Weiner."

As previously stated, several of the current petitioners had sought to intervene in the proceeding before Judge Weiner involving the same relocation issue between the same parties. Judge Weiner had held a conference with counsel for all parties and stated that he was not going to rule on the Petition to Intervene at that time because he did not intend to take any action in the proceeding, but that if he changed his mind he would hear the Petition to Intervene before taking any action. Petitioners now know that the only additional proceeding before Judge Weiner was a Stipulation and Order dated 6/27/74 evicting the tenants (plain-

tiffs) because they had refused to comply with the former Court approved Stipulation of October 11, 1973. So far as the petitioners knew, the status was as Judge Weiner had left it at the time they had sought to intervene in the initial litigation that had been dismissed by the Judge.

In any event, it is universally accepted that factual allegations in pleadings must be accepted as true by the court unless an evidentiary hearing is granted. None was granted in the instant proceeding. Representative of many decisions supporting the general principal is that of Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960) wherein the Court discussed the standard to be applied in determining judicial latitude with respect to well pleaded allegations of fact. The Court stated:

"The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on motion to intervene, at least in the absence of sham, frivolity, and other similar objections.'...

"For the purposes of a motion to permit intervention, all allegations in the pleading, which the intervenors propose to serve where they are made part of the action, must be deemed to be true. Kaufman v. Wolfson, D.C.S.D.N.Y., 137 F.S. 479, 481" 278 F.2d at 109.

The Court then stated at p. 109:

"...Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merit."

The Sixth Circuit held the same in the Skillken case:

"Since the District Judge summarily denied the motion to intervene without a hearing and without taking evidence, we must assume that the factual allegations in the motion and in the accompanying answer are true." (p. 873)

The Seventh Circuit is also in conflict with the Third Circuit on acceptance of factual allegations.

Clark v. Sandusky, 205 F.2d 915, 918 (7th Cir. 1953).

Had plaintiffs, as required by Rule 19 F.R.C.P., presented to the Trial Court the names of the intervenors who had proposed to intervene in this matter before the first trial judge intervenors would have had knowledge at an earlier time and would have petitioned to intervene at an earlier time.

Rule 19 in relevant part is as follows:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be joined if feasible.

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if *** (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest..." (emphasis added)

...

(c) Pleading Reasons for non-Joinder

"A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

The language underlined is almost identical to the "interest" provision contained in Rule 24(a)(2).

Counsel for respondents knew the names of the petitioners herein who had sought to intervene on November 9, 1973 in the same prior litigation terminated by dismissal. With that memory fresh in their minds they filed this lawsuit on behalf of the respondents without notifying the Court of the interest of the proposed intervenors, all in violation of Rule 19. Respondents, not Petitioners, are responsible for such delay as occurred.

It is logically indefensible that the Courts below denied petitioners the right to intervene as defendants on the basis of an untimely application when the very order denying intervention contained in it an express reservation of the right to inter-

vene for any additional plaintiffs. (A-2, p. 2)

In other words, those desiring newly constructed low-income housing in Society Hill could still intervene. Those opposing it were, at the same point in time, untimely. The Court stated:

"The renewed motion of plaintiffs to have this action certified and proceed as a class action is DENIED, without prejudice to any person who may be within the definition of the proposed class from joining as a party plaintiff." (A-2, p. 2)

It would appear conclusive that if it ~~was~~ not too late to intervene as a plaintiff, it was not too late to intervene as a defendant.

5. The Courts below sought to circumvent the Arlington Heights decision by this Court requiring intent to discriminate through zoning before a court can order a municipalities zoning changed to permit low-income housing.

By the Consent Decree process the courts below have sought to do what they could not do based upon a proper record with all interested parties participating. Zoning is being changed on two

parcels of ground without either allegation or evidence of intent to exclude or discriminate through zoning. This is in conflict not only with the Arlington Heights decision of this Court, 429 U.S. ____, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977) and Skillken by the Sixth Circuit but with the most recent Arlington Heights decision by the Seventh Circuit Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, ____ U.S. ____, 98 S.Ct. 752 (1978) setting out a wide range of matters to be considered before zoning can be changed by a Federal Court. Among that range of considerations was evidence of intent, of which there is none here, and a failure on the part of the city to zone in such a way that there is land available for low-income housing. Lack of land zoned suitably for low-income housing has not been alleged. In the Society Hill area substantial lands are zoned for multi-density housing

and some 400 units of low-income housing are currently projected to be built in part in the Society Hill historic district. Several hundred more units have already been built within some six to eight blocks distance from the technical borders of the Society Hill Urban Renewal area and multiple thousands of units in the city of Philadelphia. Accommodations in existing, as opposed to newly constructed housing, have been offered to Respondents in Society Hill.

This is evidence that the Court excluded, though largely contained in official records, but the important fact is that by abuse of the Consent Decree process wherein only parties desiring to build such housing are permitted to participate in litigation the courts have changed the zoning in the city of Philadelphia in conflict with the Arlington Heights decision of this Court and the Seventh Circuit as well as Skillken in the Sixth Circuit. HUD is in the

business of installing low-income housing.

The City of Philadelphia has been threatened by HUD by letter of May 13, 1977 with substantial loss of Federal funds if it does not install low-income housing. In the same breath or letter HUD, erroneously joined as defendant, has strongly urged low-income housing in Society Hill. Society Hill voters have also consistently voted against the current Mayor of Philadelphia. The Respondents stand to gain housing in one of America's most expensive residential neighborhoods at very substantial public expense. The only people who have an interest in asserting the law as it has been written are the petitioners and they have been denied any voice.

6. For the reasons just discussed, because all parties permitted to participate in the litigation favor the low-income housing in Society Hill, a consent decree is being wrongly utilized to bring to bear the power of a Federal district

court order entered in a proceeding where there is no case or controversy. The Courts below acknowledge that petitioners interest is not represented. (A-3, p. 13)

7. By utilizing the Consent Decree along with exclusion of all opposition voices the Courts below have sought to circumvent both congressional and regulatory intent by placing low-income housing in a luxury sector of the city of Philadelphia. Congress has stated that the Nation's housing programs are to meet essential needs such as "decent, safe and sanitary dwellings for families of low-income." Section 1 of the United States Housing Act of 1937, 42 U.S.C. § 1401 (1970). HUD has rightly, in its regulations, sought to implement the non-luxury policy. Section 8 housing as proposed in the instant litigation is constrained as follows:

"Fair Market Rent. (a) The rent, including utilities (except telephone), ranges and refrigerators, parking, and all maintenance,

management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design meeting the objectives of the HUD Minimum Property Standards." 24 C.F.R. 880.102, p. 415.

Land alone in Society Hill is so expensive as to make a mockery of the phrase "modest (non-luxury)" housing.

8. By precluding petitioners right to intervene the Courts below have denied to them the right to plead res adjudicata and other violations of the law.

9. Other law being violated by the consent decree without opposition is HUD's own regulation:

"A contract may be for an initial term of not more than five years, with an option solely in the owner to renew for additional terms of not more than five years each...."

The Court decree in blatant disregard of the above regulation mandates that the developer take pursuant to a covenant requiring that the properties

be used for "low and moderate" income housing "for the term of twenty years".

Conclusion

With HUD moving to achieve economic integration across the nation and with everyone but the citizens of the threatened area represented, the question of the right of the citizens to participate in litigation to attempt to protect the value of their homes and the quality of their lives is going to arise again and again.

HUD should not be allowed, erroneously posing as a defendant, through an abuse of the consent decree process to circumvent the law as written by this Court, Congress, HUD's own regulations and Sister Circuits. A consent decree should not be used to do what the courts can not do under the law.

With activist housing suits being brought, with cities being threatened with diminution of Federal funding if they do not comply with HUD's

current version of the law and with citizens whose property values are to be destroyed by the results of this activity being excluded from participation in the judicial process, there will be no one to support the law as written. The Consent Decree arrived at without participation of all interested parties is worse than a pig in a poke, it is action by the court that sees no evidence, hears no evidence and does evil because the issues have never been developed.

Petitioners respectfully pray that this Honorable Court reverse the Third Circuit Court of Appeals in order that a judicial decree in this matter might be based on the law and not on the self-conceived interests of like minded parties without opposition.

Respectfully submitted,

DAVID M. JONES
1600 PNB Building
Philadelphia, Pa. 19107
Attorney for
Petitioners

OLAN B. LOWREY
1719 North Broad Street
Philadelphia, Pa. 19122
Of Counsel